

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND HARDAWAY,

Defendant-Appellant.

UNPUBLISHED

September 17, 2009

No. 284980

Wayne Circuit Court

LC No. 07-020950-FH

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 99 months to 15 years' imprisonment. Defendant appeals as of right. Because defendant was not denied the effective assistance of counsel, his convictions are supported by sufficient evidence, and he has waived any issues concerning the scoring of prior record variable 2, we affirm.

I. Ineffective Assistance of Counsel

Defendant claims that he was denied the effective assistance of counsel. Because defendant did not move for a *Ginther*¹ hearing, our review of defendant's claim is limited to mistakes apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

An accused has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different and the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel’s performance must be measured without the benefit of hindsight. *Odom, supra* at 415.

Defendant first argues that counsel was ineffective when he failed to preserve and present the victim’s MySpace web page. According to defendant, the web page would have established that the victim had a “pattern of lying” because the victim, on her MySpace page, claimed that she was 18 years old and married. Defendant also argues that counsel was ineffective for failing to inquire into the disappearance of the victim’s MySpace page. Defendant claims that had counsel done so, counsel “may have been able” to establish a *Brady*² violation. However, the trier of fact knew what defendant argues the victim’s MySpace page would have established—that the victim lied about her age and marital status. On cross-examination, the victim admitted that she lied on her MySpace page about her age and marital status. Accordingly, there is no reasonable probability that if counsel had investigated the disappearance of the victim’s MySpace page or presented the web page as evidence at trial, the result of defendant’s trial would have been different. *Odom, supra*.

Defendant also claims that counsel was ineffective for failing to present evidence showing that his car radio was functioning properly at the time of the charged crimes. This evidence would have contradicted the victim’s description of the radio as being “messed [up],” “broke,” and “falling apart.” However, defendant testified that the radio in his car was “basically a brand new radio.” Decisions regarding what evidence to present are matters of trial strategy, *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008), and this Court will not substitute its judgment for that of counsel regarding trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, defendant has not specified what evidence, in addition to his testimony, counsel could have introduced to show that the radio was functioning properly when the charged crimes occurred. Accordingly, defendant has not established that counsel’s failure to introduce evidence showing that his car radio was functioning properly deprived him of the effective assistance of counsel.

II. Sufficiency of the Evidence

Defendant argues that his convictions are not supported by sufficient evidence because the victim’s testimony was riddled with so many contradictions that no rational trier of fact could have found beyond a reasonable doubt that she was telling the truth. We disagree. “[W]e review a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), *aff’d* 466 Mich 39 (2002).

In determining whether a conviction is supported by sufficient evidence, we will not interfere with the trier of fact’s role of determining the credibility of the witnesses or the weight of the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). Here, the

² *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

trial court found the victim's account of whether she and defendant engaged in sexual conduct to be credible. The fact that there were inconsistencies in the victim's testimony does not allow this Court to substitute its judgment for that of the trial court. Viewing the victim's testimony in a light most favorable to the prosecution, there was sufficient evidence from which a trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *Sherman-Huffman, supra*. Defendant's convictions are supported by sufficient evidence.

III. Sentencing

Defendant argues that prior record variable 2, MCL 777.52, was improperly scored at 20 points, and that counsel was ineffective for failing to object to the improper scoring. Defendant did not raise this sentencing issue in his statement of the questions presented as required by MCR 7.212(C)(5). Thus, defendant has not properly presented the issue for our review. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). Moreover, defendant did not send a copy of the presentence report to the Court as required by MCR 7.212(C)(7). Defendant has, therefore, waived any issue concerning the scoring of PRV 2. *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995); *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). Absent the presentence report, we are unable to analyze whether the trial court improperly scored PRV 2.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra